

# INDEX

Opinion below.....	Page 1
Jurisdiction.....	1
Question presented.....	2
Statement.....	2
Summary of argument.....	2
Argument:	
Probation for a period of three years is authorized for petty offense cases under federal legislation, and is not so serious as constitutionally to require a jury trial.....	3
1. The question whether a charge of criminal contempt was properly heard in the absence of a jury is to be answered by considering whether the penalty imposed would have been constitutionally permissible for a petty offense.....	3
2. Suspension of sentencing, pending a three-year probationary period, is an authorized disposition for petty offenses under federal legislation.....	4
3. The federal probation statute is not unconstitutional insofar as it makes possible a three-year term of probation in petty offense cases tried in the absence of a jury.....	7
Conclusion.....	16
Appendix A.....	17
Appendix B.....	19

## CITATIONS

### Cases:

<i>Bloom v. Illinois</i> , 391 U.S. 194.....	4
<i>Block, In re</i> , 50 N.J. 494, 236 A. 2d 589.....	12
<i>Buehrer, In re</i> , 50 N.J. 501, 236 A. 2d 592.....	12
<i>Cheff v. Schnackenberg</i> , 384 U.S. 373.....	4
<i>District of Columbia v. Clawans</i> , 300 U.S. 617.....	4

## Cases—Continued.

	Page
<i>Driver v. United States</i> , 232 F. 2d 418.....	6
<i>Duncan v. Louisiana</i> , 391 U.S. 145.....	4, 5, 7, 8, 9, 10, 15
<i>Hollandsworth v. United States</i> , 34 F. 2d 423.....	5
<i>Jones v. Cunningham</i> , 371 U.S. 236.....	13
<i>Korematsu v. United States</i> , 219 U.S. 432.....	15
<i>Mitchem v. United States</i> , 193 F. 2d 55.....	6
<i>Roberts v. United States</i> , 320 U.S. 264.....	13
<i>United States v. Barnett</i> , 378 U.S. 681.....	4
<i>United States v. Murray</i> , 275 U.S. 347.....	13
Constitution, statutes and regulation:	
United State Constitution, Sixth Amendment.....	3
Fair Labor Standards Act.....	6
United States Code:	
15 U.S.C. 1.....	6
18 U.S.C. 1.....	5
18 U.S.C. 3401.....	5
18 U.S.C. 3651.....	4, 5, 7
18 U.S.C. 3653.....	5, 14
21 U.S.C. 333.....	6
29 U.S.C. 216.....	6
Kansas Stat. § 21-112.....	11
Minnesota Statute Crim. Code 1963, § 609.02(3).....	11
N.J.S.A. 2A:168-1.....	12
New York (McKinney), Penal Law, § 65.00.....	10
Oregon Rev. Stat.:	
§ 137.510.....	11
§ 137.550.....	11
Wisconsin Statute:	
§ 57.01.....	11
§ 57.04.....	11
F.R. Crim. P., Rule 38(a)(4).....	2

### III

#### Miscellaneous:

Administrative Office of the United States Courts, <i>Persons Under the Supervision of the Federal Probation System (Fiscal Year 1966)</i> -----	Page 6
American Bar Association Project on Minimum Standards for Criminal Justice, <i>Standards Relating to Sentencing Alternatives and Procedures (1967)</i> -----	10, 13
American Law Institute, Model Penal Code: Proposed Official Draft (1962)-----	10, 11
Tentative Draft No. 2-----	7
Attorney General's Survey of Release Procedures, <i>The Vol. 2 (1939)</i> -----	8, 13
Dressler, <i>Practice and Theory of Probation and Parole (1959)</i> -----	8
Rubin, <i>The Law of Criminal Correction (1963)</i> -----	8
President's Commission on Law Enforcement and Administration of Justice, <i>The Challenge of Crime in a Free Society (1967)</i> -----	14
President's Commission on Law Enforcement and Administration of Justice, <i>Task Force Report: Cor- rections</i> -----	11

Ministry of Justice of the United States Court  
Venezuela (1967) (X) (1967) (1967)  
Law System (1967) (1967) (1967)  
American Bar Association Project on Minimum  
Standards for Criminal Justice Systems Relating  
to Sentencing, Appellate and Probation (1967)  
American Bar Association, Model Penal Code  
Proposed Official Draft (1962)  
Legislative Draft No. 1  
Theory General Theory of Criminal Law  
1962 (1962)  
Proposed Theory of Criminal Law and Justice  
(1962)  
Rudin, V. A. (1962) (1962) (1962)  
President's Commission on Law Enforcement and  
Administration of Justice, The Challenge of Crime  
in a Free Society (1967)  
President's Commission on Law Enforcement and  
Administration of Justice, Task Force Report on  
Criminals

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1968**

**No. 200**

**BEN H. FRANK, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES**

**OPINION BELOW**

The opinion of the court of appeals (A. 28-30) is reported at 384 F. 2d 276.

## **JURISDICTION**

The judgment of the court of appeals was entered on October 26, 1967 (A. 31). A petition for rehearing was denied on November 20, 1967 (A. 32). The petition for a writ of certiorari was filed on December 18, 1967, and was granted on June 17, 1968 (A. 33; 392 U.S. 925). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

### QUESTION PRESENTED

Whether, on conviction for criminal contempt after a trial without a jury, the court could suspend the imposition of sentence and place petitioner on probation for a period of three years.

### STATEMENT

Petitioner was charged with criminal contempt in the United States District Court for the Western District of Oklahoma as a result of his violations of an injunction, obtained by the Securities and Exchange Commission in 1952, restraining him from using interstate facilities in the sale of certain oil interests unless a registration statement was in effect with the S.E.C. (A. 10-11). Petitioner unsuccessfully demanded a jury trial (A. 16, 18-19), and was tried on July 22, 1966 in the absence of a jury. Upon his conviction, imposition of sentence was suspended and petitioner was placed on probation for a period of three years<sup>1</sup> (A. 23-24).

### SUMMARY OF ARGUMENT

This Court has held that where jury trial is denied in a criminal contempt case, the only punishments which can be imposed are those which could constitutionally be imposed, in the absence of a jury, in petty offense cases. A three-year period of probation is a legislatively authorized disposition in petty offense cases under the federal probation statute; in practice, probation periods in excess of the maximum

<sup>1</sup> Pursuant to Rule 38(a)(4), F.R. Crim. P., the order placing petitioner on probation has been automatically stayed during the pendency of this appeal.

allowable jail term are frequently imposed in petty offense cases in federal court. The Court has stated that in determining the constitutionality of challenged punishments inflicted in non-jury proceedings, its concern will be with the laws and practices of the Nation. A survey reveals laws and practices in many states which are in conformity with the federal law and practice in misdemeanor cases, probation terms in excess of the statutory maximum imprisonment terms are frequently authorized and applied. These laws and practices have a solid footing in penology. Probation imposes far less restraint than imprisonment, but requires a relatively lengthy period of time to accomplish its rehabilitative goals. A holding which forbade the use of moderate length probation terms in petty offense cases thus might discourage its use, leading to greater use of imprisonment and less flexibility in offender disposition.

# ARGUMENT

PROBATION FOR A PERIOD OF THREE YEARS IS AUTHORIZED FOR PETTY OFFENSE CASES UNDER FEDERAL LEGISLATION, AND IS NOT SO SERIOUS AS CONSTITUTIONALLY TO REQUIRE A JURY TRIAL

- 1: THE QUESTION WHETHER A CHARGE OF CRIMINAL CONTEMPT WAS PROPERLY HEARD IN THE ABSENCE OF A JURY IS TO BE ANSWERED BY CONSIDERING WHETHER THE PENALTY IMPOSED WOULD HAVE BEEN CONSTITUTIONALLY PERMISSIBLE FOR A PETTY OFFENSE

It is now established that there is a class of "petty offenses" as to which the Sixth Amendment to the Constitution does not require trial by jury. District

of *Columbia v. Clawans*, 300 U.S. 617; *Duncan v. Louisiana*, 391 U.S. 145, 159-162. The nature of criminal contempt, in and of itself, is not such as to require jury trial in all cases; it may be a petty offense. *Cheff v. Schnackenberg*, 384 U.S. 373, 379-380. Because statutes authorizing courts to try and convict persons for criminal contempt often do not state a maximum term of imprisonment, the Court in criminal contempt cases has "scized upon the penalty actually imposed as the best evidence of the seriousness of the offense." *Duncan v. Louisiana, supra*, at 162 n. 35.

In evaluating this evidence, it has accepted "the judgment of [*United States v.*] *Barnett* [376 U.S. 681] and *Cheff* [*v. Schnackenberg*, 384 U.S. 373,] that criminal contempt is a petty offense unless the punishment makes it a serious one." *Bloom v. Illinois*, 391 U.S. 194, 198. Consequently a punishment permissible in petty offense cases tried in the absence of a jury would also be permissible in criminal contempt cases so tried; a greater penalty requires a jury trial. *Ibid.*

2. SUSPENSION OF SENTENCING, PENDING A THREE-YEAR PROBATIONARY PERIOD, IS AN AUTHORIZED DISPOSITION FOR PETTY OFFENSES UNDER FEDERAL LEGISLATION \*

The federal probation statute, 18 U.S.C. 3651, states without qualification that a defendant may be put on probation for a period which "shall not ex-

\* It should be clear that we are not dealing in this case with a "sentence to serve three (3) years" following which petitioner "was placed on probation" (Pet. Br., p. 1). Were one to violate the terms of probation in such a case, he would be

ceed five years" after conviction for "any offense not punishable by death or life imprisonment." Since a petty offense is defined by statute as an offense, 18 U.S.C. 1, the natural reading of the probation statute is that a defendant convicted of a petty offense may be put on probation for a period not exceeding five years. Any doubt that the probation system applies to petty offenders is eliminated by 18 U.S.C. 3401, which authorizes United States Commissioners to try petty offenses only, and states that the "probation laws shall be applicable to persons so tried." Section 3401 gives no indication that a maximum different from that stated in the probation statute might be applicable to petty offenses.

We have found neither court holding nor legislative history to cast doubt on this straightforward reading.

subject to a three-year jail term, which is in excess of what the Constitution and statutes permit for petty offenses. 18 U.S.C. 1; *Duncan v. Louisiana, supra*. In the present case, petitioner was never sentenced. Exercising his discretion under 18 U.S.C. 3651 to "suspend the imposition \* \* \* of sentence," the trial judge ordered only the three-year probationary period in issue here. Should petitioner violate the terms of his probation, the court, after hearing, "may revoke the probation \* \* \* and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed." 18 U.S.C. 3653. The government reaffirms that in such an event sentence would be limited to six months' imprisonment and a \$500 fine, or both. 18 U.S.C. 1.

Under the new Federal Magistrates Act, now awaiting Presidential signature, United States Magistrates will exercise the present powers of U.S. Commissioners under 18 U.S.C. 3401, and may in addition try other minor offenses carrying penalties of up to one year and \$1,000 if trial in district court is waived. 28 U.S.C. 636, 18 U.S.C. 3401, as amended by the Act. The probation laws are to be applicable to persons tried by a Magistrate, as they now are to persons tried by a Commissioner. *Ibid.*

To the contrary, there are at least three holdings in the courts of appeals sustaining the imposition of probationary periods exceeding the maximum term of imprisonment possible for the offense. *Hollandsworth v. United States*, 34 F. 2d 423 (C.A. 4) (maximum term of imprisonment of one year, defendant placed on probation for five years); *Mitchem v. United States*, 193 F. 2d 55 (C.A. 5) (maximum term of imprisonment of two years, defendant placed on probation for three years); *Driver v. United States*, 232 F. 2d 418, 421 (C.A. 4) (maximum term of imprisonment of one year, defendant placed on probation until he secured satisfactory employment).

Sentencing practice confirms what the text indicates. Of 263 persons placed on probation by United States Commissioners during fiscal 1966—necessarily for petty offenses—the term of probation for 150, or 57%, was in excess of six months; for 64, or 24%, the term of probation was in excess of one year. This is consistent with the underlying theory of probation. "The disposition presupposes reasonable con-

---

\* Administrative Office of the United States Courts, *Persons Under the Supervision of the Federal Probation System (Fiscal Year 1966)*, p. 58. The practice in U.S. District Courts is harder to describe from the available statistics. However, offenders against federal regulatory statutes, such as the antitrust laws, food and drug acts and the Fair Labor Standards Act (*id.* at 128), were placed on probation 584 times in fiscal 1966. There were only 218 terms of 12 months or less (37%); 187 (32%) of the terms were for two years, and 166 (28%) were in excess of two years (*id.* at 16). Since these statutes generally carry low maximum terms of imprisonment (e.g., 29 U.S.C. 216, 6 months; 16 U.S.C. 1, 1 year; 21 U.S.C. 333, 1 year), it appears that in district courts also, probation terms in excess of the maximum possible term of imprisonment are often imposed.

confidence in the defendant's rehabilitative potentialities, with or without supervision as the case may be. The length of the period should be determined, therefore, by the time required to determine whether confidence has been misplaced and to give the supervisory regime adequate opportunity to be effective. The period for which an institutional commitment may be made, in dealing with offenders of a different type, is quite irrelevant to either of these purposes." American Law Institute, Model Penal Code, Tentative Draft No. 2, p. 147 (comment on proposed Section 301.2). Thus, it would be contrary to the purpose of the probation statute to adopt unnecessarily a construction which limited judicial discretion, either in petty offense cases or in minor offense cases generally, by limiting the duration of probation terms to the maximum possible terms of imprisonment.

3. THE FEDERAL PROBATION STATUTE IS NOT UNCONSTITUTIONAL INsofar AS IT MAKES POSSIBLE A THREE-YEAR TERM OF PROBATION IN PETTY OFFENSE CASES TRIED IN THE ABSENCE OF A JURY

This Court has not previously considered the constitutional limits to be observed when placing persons on probation for petty offenses tried in the absence

<sup>2</sup> This argument is stated in terms of the three-year period of probation actually imposed, in conformity to the Court's ordinary practice in contempt cases. Unlike the maximum term of imprisonment, however, the maximum term of probation possible for criminal contempt is set by statute, 18 U.S.C. 3651. Thus, the Court may consider it appropriate to consider as the issue presented whether a five-year probationary term is a constitutionally permissible disposition for a petty offense. The government would make the same argument as is here presented in that event.

of a jury. It has indicated, however, that in determining such questions, it will "refer to objective criteria, chiefly the existing laws and practices in the Nation," *Duncan v. Louisiana, supra*, at 161. These, we believe, support the imposition of probation terms substantially in excess of the maximum possible term of imprisonment in non-jury cases.

Probation was unknown when the Constitution was adopted, although some have suggested historical antecedents in such practices as benefit of clergy, judicial reprieve to permit the seeking of pardon from the Crown, and recognizance. The first American probation officer, a volunteer, began to give security for the good behavior of petty offenders in Massachusetts in 1841. The first probation statute appeared in Massachusetts in 1878; the institution spread more slowly than its contemporary, the juvenile court, and was not available in every state until 1957.<sup>\*</sup> Thus, historical analysis will not assist in determining whether three years of probation is appropriate for petty offenses, or not.

A survey of the present state limitations on the duration of probation in petty offense cases is made difficult by the considerable variation among the states in their treatment of right to jury trial for minor offenses. As the Court is aware from its consideration of the *Duncan* case last Term, the size of the jury afforded, whether or not unanimity is re-

<sup>\*</sup> *The Attorney General's Survey of Release Procedures*, Vol. 2, pp. 1-33 (1939); Rubin, *The Law of Criminal Correction*, pp. 176-178 (1963); Dressler, *Practice and Theory of Probation and Parole*, pp. 6-27 (1959).

quired, and the stage of the proceedings at which it is afforded—*ab initio*, or on *de novo* appeal—differ from state to state; many states afford the right of trial to such juries to a greater extent than the federal Constitution appears to require. The statutes are often unclear regarding their application to municipal ordinance violations and traffic infractions, the matters most commonly treated as non-jury. State criminal statistics, when available, are not keyed to the jury-nonjury distinction. It is nonetheless possible to show that most jurisdictions authorize probation terms substantially in excess of imprisonment terms, for minor offenses, and that such probation terms are often imposed.

Probation terms for misdemeanors are limited to the same range as jail terms for misdemeanors in eleven, perhaps twelve, jurisdictions.<sup>7</sup> In at least nine jurisdictions, the length of the probation term is entirely discretionary with the sentencing judge. Fifteen jurisdictions provide for a maximum probation term of five years; in most cases, as in federal law, this is without distinction as to the type of crime committed, but two states<sup>8</sup> provide the possibility of extension

<sup>7</sup> See the Appendix to Appellant's Brief in *Duncan v. Louisiana*, No. 410, O.T., 1967, and the discussion in Appellee's Brief and Appellant's Reply Brief, *ibid.* It was unnecessary to consider these variations in *Duncan*, since they were not presented there and frequently would arise only as to cases permissibly treated as "petty" in any event, 391 U.S. at 158 n. 30 and 211 ff. (opinion of Mr. Justice Fortas). However, should the practice of a particular state not constitute a "jury trial" for federal constitutional purposes, its probation practice would be directly comparable to the federal practice at issue in this case.

<sup>8</sup> See Appendix B, *infra*, pp. 19-22.

<sup>9</sup> California and Illinois; see Appendix B, *infra*.

where the crime carries the possibility of a longer prison term. In five jurisdictions, a two-year maximum is set for misdemeanors, generally together with a longer term for felonies; in three jurisdictions, the maximum may exceed by a stated amount the maximum possible jail sentence. The remainder of the jurisdictions also authorize probation terms in excess of minor offense penalties in a variety of ways, set out in the Appendix. Thus, despite considerable diversity in particulars, there is general agreement on probation terms which substantially exceed the maximum prison term applicable to minor offenses. And this agreement is also reflected in two recent, major national studies: the American Law Institute's Model Penal Code provides that "the period of \* \* \* probation shall be \* \* \* two years upon conviction of a misdemeanor or a petty misdemeanor, unless the defendant is sooner discharged by order of the Court";<sup>10</sup> the minimum standards on sentencing adopted by the American Bar Association, on August 6, 1968, as part of its Project on Minimum Standards for Criminal Justice, and published in *Standards Relating to Sentencing Alternatives and Procedures* (1967), make a similar recommendation.

In order to be able to acquaint this Court with "the existing \* \* \* practices in the Nation," *Duncan, supra*, 391 U.S. at 161, we asked the chief legal officer of each State, Commonwealth and Territory to supply us with such statistics as he might have. The responses, which we have lodged with the Clerk,<sup>11</sup> show chiefly that

<sup>10</sup> American Law Institute, Model Penal Code, Proposed Official Draft (1962), Section 301.2.

<sup>11</sup> Copies have been served on counsel for petitioner.

such statistics are lacking; other than the United States Commissioner statistics discussed above, we have obtained no figures limited to non-jury situations. We have found, however, that in three states,<sup>12</sup> as in the American Law Institute draft, state law fixes at least a minimum period of probation to be served, subject to demonstration by the probationer that he deserves earlier release; in at least two more, there is a general practice of imposing a uniform probation term in minor offense cases.<sup>13</sup> In all six states, the minimum or usual term is equal to or greater than the maximum jail sentence permissible under state law. Moreover, on the basis of a nationwide survey, the National Council on Crime and Delinquency reported that "Length of stay on misdemeanor probation ranges from 6 months to 3 years; the median is 12 months. Both the range and the median are considerably longer than the comparable figures for jail commitment." The President's Commission on Law Enforcement and Administration of Justice, *Task Force*

---

<sup>12</sup> New York (McKinney's), Penal Law, § 65.00 (minimum probation of one year for misdemeanors generally punished with up to three months imprisonment; minimum of three years for more serious misdemeanors).

Oregon Rev. Stat. § 137.510 (minimum probation term one year, subject to reduction (§ 137.550)).

Wisconsin Stat. §§ 57.01, 57.04 (minimum probation term one year).

<sup>13</sup> In Kansas, the standard probation term for misdemeanors imposed in all but exceptional cases is two years. Misdemeanors are punishable by up to one year imprisonment, Kansas Stat. § 21-112, and are jury offenses.

In Minnesota, the standard probation term for misdemeanors is one year; the maximum imprisonment possible is 90 days, Minnesota Stat., Crim. Code 1963, § 609.02(3).

*Report: Corrections*, Appendix A, p. 159. Indeed, in two recent cases the New Jersey Supreme Court resolved the same issue as is presented here in favor of the longer probation term. *In re Buehrer*, 50 N.J. 501, 236 A. 2d 592; *In re Block*, 50 N.J. 494, 236 A. 2d 589. In both cases the court followed *Cheff* in holding six months' imprisonment would be the maximum punishment for criminal contempt tried without a jury. Nevertheless, it ruled that defendants convicted summarily of criminal contempt could be placed on probation, which under the applicable New Jersey probation statute (N.J.S.A. 2A:168-1) ranges from a minimum period of one year to a maximum period of five years at the discretion of the trial court.

The reason for this practice is not far to seek:

[P]redetermination of the period during which treatment may be given seems inconsistent with the nature of a process which demands individualization and flexibility to accomplish its aims. \* \* \*

The expiration of a set probationary period may find the probationer "in an undesirable position economically, physically, mentally, spiritually, or socially" so that he remains in need of continued probationary oversight. Even where the probationer's readjustments have been effected with apparent ease and rapidity there is need to continue probation long enough "to warrant a reasonable presumption, based on adequate observations, and testing, that the probationer, freed from oversight, will under the probable circumstances of his life maintain a law-abiding and proper course of conduct."

The statutes limiting the probation period to

the maximum term of possible imprisonment are particularly vulnerable to criticism in the case of misdemeanants. A probation period of 30, 60, or 90 days is too short to afford an opportunity for the probation department to do any effective work. \* \* \*

This Court has recognized that probation is "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict." *United States v. Murray*, 275 U.S. 347, 357. Its basic purpose is "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement \* \* \*." *Roberts v. United States*, 320 U.S. 264, 272.<sup>14</sup>

A term of probation is not the equivalent of a sentence of imprisonment. Of course, the conditions imposed on a person by placing him on probation are restraints on his liberty—perhaps sufficient to create

<sup>14</sup> *The Attorney General's Survey of Release Procedures*, Vol. 2 (1939) 313-314.

<sup>15</sup> It does not follow that because probation is an ameliorative device, a term of probation ought not to exceed the possible prison term. The American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures* (1967), adopted August 6, 1968, recommends that, in general, ameliorative sentencing devices should be available for no longer than imprisonment (Section 2.6). However, although imprisonment for misdemeanors would be limited to one year, probation terms of up to two years are suggested (Section 2.3(b)(ii)). "[T]he exception is warranted in order to permit a sufficient length of time for rehabilitative programs to take hold" (p. 71).

a right to challenge the underlying conviction by writ of habeas corpus, see *Jones v. Cunningham*, 371 U.S. 236. But these restraints are far less serious than those of imprisonment. The probationer remains in his community, able to support himself and his family, free from the stigma of being a "jailbird" and from the serious inconveniences any forced absence from home imposes. Indeed, probation has achieved such widespread use precisely because it avoids the withdrawal from the community—with its harsh impact on the defendant and his family—which is the hallmark of imprisonment.<sup>16</sup> The only general obligations imposed by probation (other than those that every law abiding citizen is subject to) are that the probationer maintain reasonable hours, that he not leave the judicial district without the permission of his probation officer<sup>17</sup> and that he report to his probation officer as directed.<sup>18</sup> The additional conditions specifically imposed on petitioner were that he refrain from those activities which the court had found to constitute violations of the injunction obtained by the S.E.C. and which resulted in petitioner's conviction (A. 25-26);

---

<sup>16</sup> President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, p. 165 (1967).

<sup>17</sup> This requirement is merely designed to keep the probation officer aware of the probationer's whereabouts and not to limit his freedom of movement. Indeed, the probation act provides that if a probationer goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred by the court to the second district court with the concurrence of that court, 18 U.S.C. 3653.

<sup>18</sup> A copy of the conditions of probation imposed on petitioner is appended to this brief as Appendix A.

that he make written reports on the first of every month; and that he report to the chief probation officer, Tulsa, Oklahoma, weekly concerning his activities of the previous week. As this Court has stated, "[t]hese and other incidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.'" *Korematsu v. United States*, 319 U.S. 432, 435.<sup>10</sup>

In sum, Congress or a state legislature could reasonably decide that the restraint of probation is sufficiently mild that probation up to a period of five years is not as serious a punishment as imprisonment for six months, and may be required to effectuate its rehabilitative purposes. These judgments should be respected, as to petty offenses generally and contempt in particular. A limitation of the period of probation for petty offenses and criminal contempts tried in the absence of a jury to the same six-month period authorized for imprisonment for these offenses would be particularly unfortunate. The effectiveness of such short-term probation is so doubtful in many cases that trial judges may reluctantly decide that they must resort to imprisonment. By reason of the Court's decision last term in *Duncan v. Louisiana, supra*, such a limitation would affect not only the federal system, but also the considered practice of many states. We urge this Court not to adopt a rule which would so limit penological flexibility.

<sup>10</sup> The maximum term of imprisonment permitted by the statute and rule at issue in *Korematsu* was one year; a five-year term of probation was imposed, apparently without challenge.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,  
*Solicitor General.*

FRED M. VINSON, Jr.,  
*Assistant Attorney General.*

PETER L. STRAUSS,  
*Assistant to the Solicitor General.*

BEATRICE ROSENBERG,  
LEONARD H. DICKSTEIN,  
EDWARD FENIG,  
*Attorneys.*

OCTOBER 1968.

## **APPENDIX A**

### **United States District Court for the Western District of Oklahoma**

**Docket No. 66-120-Cr.**

**To: Mr. Benjamin Harrison Frank**

**Address: 1334 South Quaker, Tulsa, Oklahoma**

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, July 25, 1966, for a period of three (3) years by the Hon. Luther Bobanon, United States District Judge, sitting in and for this District Court at Oklahoma City, Oklahoma.

#### **CONDITIONS OF PROBATION**

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.

(4) You shall not leave the judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions and advice.

(7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows:

1. On the first day of each month beginning August, 1966, for the period of three (3) years, fill out one of the blank report forms and mail or bring same to your Probation Officer, P. O. Box 1868, Oklahoma City, 73101.

2. The court reporter's notes will be attached to these conditions and made a part hereof.

3. Your failure to comply with the instructions of the Court as outlined herein will be cause for the revocation of your probation.

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

I have read or had read to me the above conditions of probation. I fully understand them and I will abide by them.

**SENTENCE:** Three (3) years probation.

(Signed) **BEN H. FRANK**  
Probationer.

Date **7-25-66**.

You will report as follows: As directed in Item 1 above.

**FRED L. MASON,**  
U.S. Probation Officer.

Date **7-25-66**.

## APPENDIX B

I. Maximum probation term equal to the maximum term of imprisonment which can be imposed:

ARIZONA Rev. Stat. 13.1657; 13.1645, *Peterson v. Flood*, 84 Ariz. 256.

COLORADO Rev. Stat. 39-16-6 (maximum for misdemeanor one year; maximum misdemeanor jail term also one year); 39-16-3.

GEORGIA Code 27-2709; 27-2506.

IDAHO Code 20-222 (stating a five-year maximum), *State v. Eikelberger*, 71 Idaho 282, *Ex Parte Medley*, 73 Idaho 474; Code 19-2601.

INDIANA Stat. 9-2211; 9-2209.

NEW MEXICO Stat. 40A-29-17, 40A-29-19.

PENNSYLVANIA (Purdon's) Stat. 61-331.25.

RHODE ISLAND Gen. L. 12-19-8, 12-19-13.

TENNESSEE Code 40-2901.

TEXAS Code Crim. P. 42.13 (two years; maximum jail term for misdemeanor also two years).

WASHINGTON Rev. Code 9.95.210; 9.92.060.

II. Maximum probation term in the discretion of the court:

ALABAMA Code 42.22, 42.24; 42.19, *Holman v. State*, 193 So. 2d 770.

\*DISTRICT OF COLUMBIA Municipal Code 16-710.

IOWA Code 247.20.

\*The stated maximum appears to apply to violations as to which there is no right to jury trial in any form, at any stage in the proceedings. In other cases the jury may be restricted in size, available only on appeal, or otherwise limited, see p. 9 and n. 7, *supra*.

**MARYLAND** Code 27-639; 27-641.

**MASSACHUSETTS** Gen. Laws 279-1, *King v. Commonwealth*, 246 Mass. 57, 60.

**UTAH** Code 77-35-17.

**VERMONT** Stat. 28-1008; 28-1019.

**VIRGINIA** Stat. 53-272.

**WYOMING** Stat. 7-321; 7-318.

**OKLAHOMA** appears to leave the matter in the discretion of the court, Okla. Stat. 57-520, as amended by c. 204, Okla. Sess. Laws 1968, but the Attorney General indicates an emerging position that sentence is in fact limited to the maximum possible jail term.

### III. Maximum probation term of five years

\***ALASKA** Stat. 12.55.090(c); 33.05.080, *Knudson v. Anchorage*, 358 P. 2d 375 (suspended execution of sentence; there is a one-year limit where imposition of sentence is suspended, 12.55.080).

**ARKANSAS** Stat. 43-2331 (Supp. 1967).

**CALIFORNIA** Pen. Code 1203.

\***CONNECTICUT** Gen. Stat. 54-113; 54-111.

\***GUAM** Pen. Code 1231, 1232, 1234.

**ILLINOIS** Stat. (Smith-Hurd) 38-117-1.

**KENTUCKY** Rev. Stat. 439.270; 439.260, 439.550.

**MISSISSIPPI** Code 4004-25; 4004-23 (Supp. 1966).

**NEVADA** Rev. Stat. 176.330; 176.300.

**NEW HAMPSHIRE** Rev. Stat. 504.1 (see also 607.12).

**NORTH CAROLINA** Gen. Stat. 15-200, *State v. Gibson*, 233 N.C. 691.

**OHIO** Rev. Code 2951.07, 2951.02.

\*Footnote on p. 19.

OREGON Rev. Stat. 137.510.

SOUTH CAROLINA Code 55-594; 55-591 (in courts of record; for suspension of sentence, see Code 17-557, 558).

WEST VIRGINIA Code 62-12-11; 62-12-1, 62-12-4.

IV. Maximum misdemeanor probation term of two years (maximum jail term one year or less);

MAINE Rev. Stat. 34-1631.

\*MICHIGAN Stat. 28.1131, 28.1132.

MISSOURI Rev. Stat. 549.071.

NEBRASKA Rev. Stat. 29-2217, 29-2219.

WISCONSIN Stat. 57.04, 57.025.

V. Maximum probation term may exceed maximum jail term by stated amount:

FLORIDA Stat. 948.04; 948.01 (1968 Supp.; two years).

\*NORTH DAKOTA Code 12-53-01; 12-53-03 (18 months).

SOUTH DAKOTA Code 34.3708 (Supp. 1960; two years on suspended execution of sentence).

#### VI. Others

\*DELAWARE Code 11-4332, 11-4334 (Supp. 1966; maximum term which may be imposed or one year, whichever is greater).

\*HAWAII Rev. Laws 257-12 (13 months).

\*KANSAS Stat. 12-1104 (one year, ordinance violation); 62-2243 (five years, misdemeanors).

\*LOUISIANA Code Crim. P. 894 (one year on recognizance, two years under supervision, for misdemeanors).

\*Footnote on p. 19.

MINNESOTA Stat., Crim. Code, 1963, 609.135

(i) 100 (one year, misdemeanor) (90 days imprisonment, § 609.02(3)); two years, gross misdemeanor).

MONTANA Rev. Code 95-2203, 95-2206 (deferred sentencing, three years; deferred execution of sentence, maximum possible jail term).

\*NEW JERSEY Stat. 2A:169-6 (three years for non-jury offense); 2A:168-1 (one to five years for jury offense).

\*NEW YORK Penal Law (McKinney) 65.00 (one year fixed term for Class B misdemeanors and others punishable with three months imprisonment or less; three year fixed term for Class A misdemeanors and others punishable with more than three months imprisonment).

\*Footnote on p. 19.

